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SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

~~1435~~ 70-190

POP POPPENHEIMER, Et Al,
PLAINTIFFS-PETITIONERS

v.

CITY OF MEMPHIS AND SHELBY COUNTY
QUARTERLY COURT AND COMMISSIONERS,
DEFENDANTS-RESPONDENTS

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

This brief is respectfully filed in behalf of the Defendants City of Memphis and Shelby County Quarterly Court and Commissioners in opposition to the petition for writ of certiorari filed hereon.

STATEMENT OF THE CASE

The Respondents feel, with all deference to the Petitioners, that a statement of the history of this

case is necessary to aid this court in its decision, and that such a statement was succinctly enunciated by the Tennessee Supreme Court in its opinion, beginning on page 32 of the Petition for Writ of Certiorari. The Supreme Court of Tennessee made the following statement:

> "Appellants, complainants below, citizens and taxpayers of Shelby County, filed an original bill in the Chancery Court of that County seeking to enjoin appellees, defendants below, from consummating contracts for consolidation of the hospitals of the City of Memphis and Shelby County and the jointly operated Oakville Memorial Hospital.
>
> The bill alleged the pending consolidation of the hospitals by contract was unconstitutional because it was not submitted by a referendum to the voters of Memphis and Shelby County for their approval as required by the Eighth Amendment to Article 11, Section 9, of the Constitution of Tennessee.
>
> The contract was executed by the City of Memphis and the Board of Commissioners of Shelby County and the Shelby County Quarterly Court on May 12, 1969.
>
> The contract provides the effective date to be

July 1, 1969. It provides for the funding of the hospital for the years 1969 through 1972 setting forth the percentage of the annual budget of the hospitals by the respective parties during the fiscal years from July 1, 1969, through June 30, 1973.

During the transition period, all capital improvements to the hospitals are to be shared by the City and County on the same basis for sharing operation costs. All properties of the City hospitals are to be conveyed to Shelby County on or before July 1, 1972.

The employees of the City hospitals are to become employees of Shelby County on or before July 1, 1972.

The contract, also, provides the annual budget for all the hospitals during the transition period be subject to approval of the governing bodies of the City and County.

The contract provides either party may cancel the contract by giving six months written notice of cancellation during the first two years of the agreement.

Upon the filing of the bill, the Chancellor granted

a temporary injunction and set the hearing for July 1, 1969.

Defendants filed motions to dismiss the bill alleging the contract was a legal agreement properly executed under authority of T.C.A. Section 5-113 and Chapter 413, Private Acts of 1933. The motions further alleged the contract was legally drafted and executed under authority of T.C.A. Section 6-3723 and Chapter 189, Private Acts of 1969.

Upon the hearing, the Chancellor dissolved the temporary injunction and set the motions to dismiss the bill for a hearing on September 22, 1969. On July 7, 1969, complainants filed an amended and supplemental bill for an injunction in which it was alleged the City of Memphis had adopted home rule by a vote of the people in 1963. That Chapter 189, Private Acts of 1969, is unconstitutional because it is an Act private and local in form and effect and violates that part of Article 11, Section 9, of the Constitution which provides: 'The general assembly shall act with respect to a home rule municipality only by laws which are general in terms and effect.'

The amended and supplemental bill further alleges unless the contract for the consolidation of

the City and County hospitals is submitted to the voters of the City and County for ratification the same will result in unconstitutional legislation in violation of Article 1, Section 8, Article II, Sections 9 and 16 of the Constitution of Tennessee; and the Fourteenth Amendment to the Constitution of the United States.

To the amended and supplemental bill all defendants filed motions to dismiss substantially upon the grounds set out above in the motions to dismiss the original bill.

The Chancellor appointed several prominent Attorneys of the Memphis and Shelby County Bar to file briefs in the matter as Amicus Curiae.

The matter was heard upon the bills, motions to dismiss, exhibits to the pleadings and briefs of the respective parties and Amicus Curiae.

The Chancellor filed a memorandum opinon in which he properly held the principal issue is whether the home rule amendment to Article 11, Section 9, of the Constitution of Tennessee applies to the consolidation of the hospital facilities of the City of Memphis and Shelby County. He held

it did not and dismissed the original, amended and supplemental bills.

We affirm the decree of the Chancellor."

OPINION OF THE SUPREME COURT

The Petitioners presented a similar position to the Supreme Court of the State of Tennessee as that which they generally set forth in their Petition for Writ of Certiorari. The Tennessee Supreme Court, in sustaining the action of the Chancellor in dismissing the Petitioners' bill, made the following statements as noted on page 35 et seq. of Petitioner's application for a Writ of Certiorari:

"Complainants have appealed and assigned five alleged errors.

The first assignment insists the Chancellor erred in failing to hold the Seventh amendment to Article 11, Section 9, of our constitution applied to Chapter 189, Private Acts of 1969.

We disagree. The Act is permissive legislation authorizing Shelby County by and through its Quarterly Court and Board of Commissioners to enter into a contract with the City of Memphis for the operation, maintenance and control of all the governmental hospitals within Shelby County.

Section 1 of the Act provides:

> 'That the County of Shelby be and it is hereby authorized by and through its Quarterly County Court and Board of Commissioners to enter into contracts with the City of Memphis through its proper authorities for the operation, maintenance and control of the Shelby County Hospital, Oakville Memorial Hospital and the City of Memphis Hospitals.'

Section 4 of the Act provides:

> 'That the Quarterly Court of Shelby County and the Board of Commissioners of Shelby County be and they are hereby authorized by agreement with the Mayor and legislative body of the City of Memphis to create and establish the appointment of, tenure of service, and qualifications of the Memphis and Shelby County Board of Hospital Trustees; such agreement, if made to be evidenced by an ordinance passed by the legislative body of the City of Memphis, the terms of such ordinance shall be embodied in and concurred in by a resolution of the Quarterly Court of Shelby County.'

It is clear the Act is not mandatory on the City of Memphis and does not violate the Sixth and Seventh Amendments to Article 11, Section 9, of the Constitution of this State.

Assigments of error two and three assail the action of the Chancellor in holding the provisions of the Eighth Amendment to Article 11, Section 9, of the Constitution of Tennessee had no application to this case.

The Eighth Amendment to Article 11, Section 9, of the Constitution reads as follows:

> 'The General Assembly may provide for the consolidation of any or all of the governmental and corporate functions now or hereafter vested in municipal corporations with the governmental and corporate functions now or hereafter vested in the counties in which such municipal corporations are located; provided such consolidations shall not become effective until submitted to the qualified voters residing within the municipal corporation and in the county outside thereof, and approved by a majority of those voting with the municipal corporation and by a majority of those voting in the county outside the municipal corporation.'

The amendment is not self-executing and is implemented by Chapter 120, Public Acts of 1957, codified as T.C.A. Section 6-3701, et seq.

Section 2 of the Act, codified as T.C.A. Section 6-3702, provides, in part:

'It is hereby declared to be the legislative intent and purpose of this Chapter to provide for the consolidation of all, or substantially all, of the governmental and corporate functions now or hereafter vested in municipal corporations with the governmental and corporate functions now or hereafter vested in the counties in which such municipal corporations are located, and to provide for the creation of metropolitan governments which may be used to fulfill the unique and urgent needs of modern metropolitan areas.'

Furthermore, Section 22 of the Act, codified as T.C.A. Section 6-3723, provides:

'Nothing in this Chapter shall be construed to alter, abridge or abrogate any provision of Sections 5-113 and 49-404 or any other law, practice, custom, or tradition with respect to contractual, cooperative, unilateral or other devices for simplifying or expediting municipal or (and) county government.'

T.C.A. Section 5-113 provides:

'The Quarterly County Court of any County and the chief legislative body of any municipality that lies within the boundaries of said county are authorized and empowered to enter into any such agreements, compacts, or contractual

relations as may be desirable or necessary for the purpose of permitting said county and said municipality to conduct, operate, or maintain, either jointly or by one (1) agency for the other, desirable and necessary services or functions, under such terms as may be agreed upon by the two (2) agencies.'

Thus, it is abundantly clear 'the predominant intent of the Act is to provide consolidation of all or substantially all of the governmental and corporate functions of county and city governments into one new metropolitan government . . . .' Glasgow vs. Fox, 214 Tenn. 656, 383 S.W. 2d 9 (1964); Metropolitan Government of Nashville and Davidson County vs. Poe, 215 Tenn. 53, 383 S.W. (2d) 265 (1964).

Chapter 413, Private Acts of 1933, which constitutes a part of the charter of the City of Memphis, is an enabling Act which authorizes Shelby County and all municipalities therein to consolidate or operate jointly any or all governmental or corporate activities or functions of the county and municipal corporations.

We conclude, as did the Chancellor, the Eighth Amendment to Article 11, Section 9, of the Constitution cannot have any application to the con-

tract consolidating the hospitals of the City and County.

We will now consider assignment of error five. This assignment insists the Chancellor was in error in failing to find the contract entered into was in violation of the constitutional rights of the people of Memphis and Shelby County under the Fourteenth Amendment of the Constitution of the United States, Article 1, Section 8, and Article 11, Section 9, to vote on the consolidation of the hospitals.

The citizens of Memphis and Shelby County are taxpayers of Shelby County. The governing bodies of the City and County are elected by the citizens and taxpayers of Memphis and Shelby County.

The operation of the hospitals is one of many of the responsibilities of the government of the City and County.

The Quarterly Court and the Board of Commissioners of Shelby County, as well as the Mayor and City Council of Memphis, are elected by the people. The contract was authorized by the general law of this State.

Both of the governing bodies of the City of Mem-

phis and Shelby County authorized, approved and adopted the contract as representatives of the people. Hence, the people of Memphis and Shelby County have not been denied their vote in violation of the Constitution of this State or of the United States.

There is a motion to strike the fourth assignment of error by appellees on the ground the question is raised in this Court for the first time.

We are of the opinion we must grant the motion and strike the assignment and exhibits thereto alleged to support same.

The assignment challenges the right of the Chancellor to appoint Amicus Curiae. No objection to this action of the Chancellor appears in the record. There is attached to petitioners' brief certain exhibits alleged to support the assignment consisting mostly of newspaper clippings which do not appear in the record.

The decree of the Chancellor is affirmed with costs."

The Tennessee Supreme Court had prior to the case at bar indicated that the Eighth Amendment to Article XI, Section 9 of the Constitution of the State of Tennessee was not self executing. In its decision

in 1962 case of **Frazier v. Carr,** 210 Tenn. 565, 360 S.W. 2d 449 at page 451 the Court said:

> "It will be noticed that the Eighth Amendment is not self executing. Therefore, as a condition precedent to its becoming effective it must be implemented by legislative enactment. It was so implementsd by Chapter 120 of the Public Acts of 1957, Chapter 199, Public Acts of 1961, and by Chapter 408, Private Acts of 1961. The two Public Acts are codified commencing at 6-3701 T.C.A."

Further in its opinion the Court indicated:

> "In 1957 the legislature enacted Public Act Chapter 120, Section 6-3701 et seq., T.C.A. to implement constitutional amendment Number 8 since that Amendment is not self executing."

The Petitioners herein subsequently filed a petition to rehear before the Tennessee Supreme Court, after consideration of which the Court made the following statement:

> "Appellants have filed a petition to rehear which makes no new argument, points out no matters overlooked or cites any new and decisive authority which was overlooked by this Court.
>
> Hence, the petition must be denied. Knox vs. Batson, 217 Tenn. 620, 399 S.W. (2d) 765 (1965). See also Rule 32 of this Court."

Thus, the Defendants rely on the opinion of the Supreme Court of the State of Tennessee, including its denial of the petition to rehear, which succinctly expresses the historical and factual aspects of the case and correctly determines the legal issues involved, and submit same in reply to the Petition for a Writ of Certiorari and the alleged assignments of error contained therein.

CONCLUSION

It is respectfully submitted that the decision of the Tennessee Supreme Court was eminently correct and that the Petition for Writ of Certiorari does not meet the prerequisites for the granting of a writ of certiorari as set forth by this Honorable Court.

Therefore, Respondents respectfully move the dismissal of the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed three copies of this Brief in Opposition to Petition for Writ of Certiorari to the Attorney for Petitioners, W. Slater Hollis, P. O. Box 80876, Memphis, Tennessee 38111, this 18th day of June, 1971.

James M. Manire

APPENDIX

Sec. 847. Consolidation and joint operation of governmental functions of the city with Shelby County — Authority granted.

Shelby County and/or all municipal corporations and/or other local governmental agencies located in said county are authorized and empowered to

consolidate or operate jointly any or all governmental or corporate activities or functions of said county and/or municipal corporations and/or other local governmental agencies located therein which may now or hereafter be authorized to operate or conduct, which may be conveniently or advantageously consolidated or operated jointly. (Priv. Acts 1933, ch. 413, Sec. 1)

Sec. 848. Same — Power to enter into contracts.

For the purpose of carrying out the powers and authorities granted by this Act (sections 847 to 850), said Shelby County and/or all municipal corporations and/or other local governmental agencies located therein are expressly authorized and empowered to enter into contract for the purpose of affecting and carrying out any such consolidation and/or joint operation of governmental or corporate activities or functions authorized by this Act. (Priv. Acts 1933, ch. 413, sec. 2)

Sec. 849. Same — Contracts to be executed by governmental bodies.

Contracts authorized by this Act (sections 847 to 850) shall be entered into and executed by and on behalf of Shelby County by either its quarterly county court or by its board of county commissioners, with reference to any governmental or corporate

activities or functions operated, conducted or controlled by either of them, and by and on behalf of municipal corporations and/or other local governmental agencies located in said county by the legislative council or other appropriate governing bodies of such municipal corporations and/or other local governmental agencies. (Priv. Acts 1933, ch. 413, sec. 3)

Sec. 850. Same — Provisions of contracts.

Any and all contracts authorized by the provisions of this Act (sections 847 to 850) may be executed in such form and with such provisions, conditions and limitations, and for such considerations, as may be acceptable to the contracting parties; and it is hereby expressly provided that such contracts may authorize the carrying on within the corporate limits of any such municipal corporation or any governmental or corporate activity or function provided for under the terms of any such contract by or through any agents, employees or other character or agency therein agreed on, whether or not they reside within the corporate limits of such municipal corporation. (Priv. Acts 1933, ch. 413, sec. 4)

REPLY BRIEF OF THE PETITIONER

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70-190

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PLAINTIFF-PETITIONER

V.

CITY OF MEMPHIS AND SHELBY COUNTY
QUARTERLY COURT AND COMMISSIONERS
DEFENDANT-RESPONDENT

NO. ~~1782,~~ OCTOBER TERM, 1970

PETITIONERS' BRIEF IN RESPONSE TO RESPONDENT'S BRIEF

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IN THE

Supreme Court of The United States

POP POPPENHEIMER ET AL
PLAINTIFF-PETITIONER

V.

CITY OF MEMPHIS AND SHELBY COUNTY
QUARTERLY COURT AND COMMISSIONERS
DEFENDANT-RESPONDENT

NO. 1732, OCTOBER TERM, 1970

PETITIONERS' BRIEF IN RESPONSE TO RESPONDENT'S BRIEF

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TO THE HONORABLES CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

REPLY TO RESPONDENT'S BRIEF ON THE SUBSTANTIVE ISSUE OF THE CASE AT BAR

Petitioners respectfully bring to the Court's atten-

tion that Respondents cite only one case in addition to the[redacted] cases cited by the Tennessee Supreme Court; namely, **Frazer v. Carr,** 210 Tenn. 565.

Respondents, however, do **not** state to this Court that, in the one case cited, supra, the "Shall Not" Clause at issue here was **not** at issue there; instead, only the "May" Clause was at issue. The **Frazier** Court was explicit,

> "Attention is at once attracted to the expression in this Amendment, to wit, 'The General Assembly **may provide for . . .**'" (emphasis by italics by the Tennessee Supreme Court), **Frazier v. Carr, supra,** at p. 575. See also **Petition for Writ of Certiorari,** at page 24.

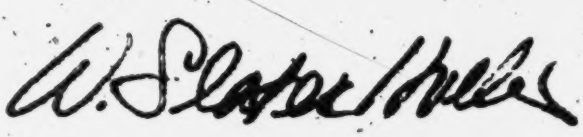
The attempt of Respondents to "generalize" the **Frazer v. Carr** decision to include, not only the "May" Clause at issue before it, but also the "Shall Not" Clause **not** at issue before it, was rejected by the Tennessee Supreme Court itself; which Court, the **Frazer** case having been cited to it by Respondents, would **not** and did **not** cite it as precedent for its decision. See **Opinion.**

ON THE PROCEDURAL ISSUES OF THE CASE AT BAR

Petitioners respectfully bring to the Court's attention that Respondents only response here was to cite

the Tennessee Court's **Opinions**; which implicitly suggests, it would seem, that Respondents concur that the profession can no longer condone the professional conduct attendant to this case where rights have been infringed upon. See **Exhibit A, infra,** and **Petition for Writ of Certiorari.**

WHEREFORE, Petitioners pray that a Writ of Certiorari issue to review the Opinion and Decree of the Supreme Court of the State of Tennessee in the case at bar.



WILLIAM SLATER HOLLIS

CERTIFICATE OF SERVICE

We hereby certify that we have this day mailed two copies of this Brief to the Attorneys for all parties to the proceedings; namely, Mr. James Manire, City Attorney, and Mr. Brady Bartusch, Assistant City Attorney, City Hall; Mr. Cleve Drennon, County Attorney, Shelby County Bldg.; Mr. Jack Petree, City Board of Education Attorney, and Ernest Kelly, Jr., Of Counsel, 900 Memphis Bank Bldg.; Mr. Lee Winchester, Jr., Co. Bd. of Educ. Attorney, Suite 3200, 100 N. Main Bldg., all of Memphis, Tennessee, and Mr. David Pack, State Attorney General, Supreme Court Bldg., Nashville, Tenn., this ~~28~~ 29th day of June, 1971.

W. Slater Hollis

EXHIBIT A

THE MEMPHIS PRESS-SCIMITAR

February 6, 1971

Ex-Justice Clark Tells Lawyers To Clean Up Their Profession

By PAMELA REEVES
United Press International Staff Writer

CHICAGO. — Former U.S. Supreme Court Justice Tom Clark Friday criticized lawyers and courts for failure to report the misdoers in their ranks.

Clark and Edward L. Wright, president of the American Bar Association and a resident of Little Rock, Ark., ranked adequate discipline of lawyers as the No. 1 priority in the profession.

Clark

The two participated in a panel discussion before state bar association presidents at the mid-year meeting of the ABA. The meeting continues through Tuesday.

Clark said only three states — Arkansas, Michigan and Wisconsin — "have had the courage" to cope with lawyer discipline adequately.

He said the prevailing attitude among lawyers and judges is "I don't want to have anything to do with it," if someone in the profession is doing something illegal or unethical.

★ ★ ★

"I HOPE I DON'T step on too many toes," Clark said, "but I think we have to change the whole philosophy of the bar on this subject."

He warned the lawyers, "If you don't do something about the problem, the legislatures are going to — the public is going to."

Wright termed internal profession discipline "the foremost problem of the profession today."

Clark was chairman of a seven-man committee which conducted a three-year study on self-discipline in the law profession.

In a report released last spring and approved unanimously by the ABA's policy-making House of Delegates last summer, the committee said it had found "a scandalous situation that requires the immediate attention of the profession."

The report covered 36 major areas and made recommendations in each of them. It suggested that public and ABA funds be used to set up adequate disciplinary channels which would be formed on statewide bases.

★ ★ ★

SUBSEQUENT TO THE REPORT a Committee on National Coordination of Disciplinary Enforcement was formed under the chairmanship of Henry Pitts, past president of the Illinois Bar Association.

Pitts said his committee has found 15 states are not even studying the problem and apparently are not contemplating doing so. He said, however, "On the whole, there's a mounting realization of the dimensions of this problem."